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Invesco

VIA ELECTRONIC SUBMISSION

June 1, 2020

Vanessa A. Countryman
Secretary
U.S. Securities and Exchange Commission
100 F Street NE
Washington, DC 20549-1090

Re: Request for Comments on Rule Proposals and Additional Measures for Expanding Investment Opportunities and Improving Access to Capital in Private Markets

Dear Ms. Countryman:

Invesco Ltd. ("**Invesco**" or "**we**") appreciates the opportunity to provide comments to the U.S. Securities and Exchange Commission (the "**SEC**" or "**Commission**") on the request for comment on various SEC rule proposals and related matters in the Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets release[1] ("**Request for Comment**") which shortly followed the SEC's June 2019 issuance of the Concept Release on Harmonization of Securities Offering Exemptions[2] (the "**Concept Release**"). Invesco is pleased that the Commission has issued this Request for Comment to balance investor protections against a much-needed clarification of various exempt offering rules, which could facilitate greater access to the private markets by qualifying investors.

Invesco is a leading independent global investment manager with approximately $1,118.6 billion in assets under management as of April 30, 2020 and $167 billion of assets under management in alternative asset classes as of the same date. In addition to providing investment solutions through open-end mutual funds, closed-end funds, exchange-traded funds (ETFs), collective trust funds, separately managed accounts, real estate investment trusts, unit investment trusts and other pooled vehicles, Invesco offers diversified alternatives investments through exempt offerings. Invesco manages private vehicles through various indirect wholly-owned U.S.-registered investment advisers, including Invesco Advisers, Inc., Invesco Private Capital, Inc. and Invesco Senior Secured Management, Inc., as well as affiliated foreign-domiciled registered investment advisers.

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[1] *Proposing Rule, Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, SEC Rel. No. 33-10763 (Mar. 4, 2020) available at https://www.govinfo.gov/content/pkg/FR-2020-03-31/pdf/2020-04799.pdf.

[2] *See Concept Release on Harmonization of Securities Offering Exemptions*, SEC Rel. No. 34-86129 (June 18, 2019), 84 FR 30460, 30467 (June 26, 2019) ("Concept Release"), available at https://www.govinfo.gov/content/pkg/FR-2019-06-26/pdf/2019-13255.pdf

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I. Executive Summary

In response to the Concept Release, Invesco participated in various industry initiatives, including in the Investment Advisers Association (the "**IAA**") letter submitted in response to the Concept Release in September 2019 as well as the IAA's submitted letter on the proposal relating to the definition of Accredited Investors (submitted in March 2020). Following these efforts, we now have undertaken to express our views on matters laid out in the Request for Comment because we generally offer our private placements under the Rule 506(b) safe harbor promulgated under the Securities Act of 1933, as amended ("**Securities Act**"). Specifically, Invesco provides its thoughts below on the definition of "General Solicitation and Advertising" governing actions prohibited under Rule 506(b) with an eye toward aligning the requirements thereunder with today's distribution models. Additionally, we are supportive of the Commission's efforts to continue to refine and add clarity to the Rule 506(c) safe harbor and to enhance its attractiveness and usefulness. Invesco is also in favor of efforts to further refine the integration rules outlined in the Request for Comment and further rulemaking on pre-offering communications to permit pre-offering communications tied to identified offerings. The viewpoints laid out below outline Invesco's views on fostering capital formation and enhancing access to private markets solutions while reasonably protecting investors from being misled about such investment solutions. The positions below are reflective of Invesco's thoughts on how to immediately enhance the exempt offering framework while retaining investor protection considerations through various alternative improvements.

We appreciate the opportunity to outline our views on the Request for Comment below.

- *Rule 506(b) and the Definition of "General Solicitation and Advertising"*
  - As laid out below, Invesco believes the Commission should consider blending Rules 506(b) and (c) for certain offerings made to a limited audience such as offerings of a fund/vehicle/investment solution relying on the 3(c)(7) exception; this position dovetails with our thoughts on Rule 506(c) requirements laid out in this letter
  - Invesco believes the "Demo Day" carveout from the definition of "General Solicitation and Advertising" should be further expanded to cover other communications intended to be received solely by high net worth and institutional investors and their representatives
  - Invesco believes "General Solicitation and Advertising" should be defined to exclude communications to a limited audience
- *Additional Clarity under Rule 506(c) as to Methods of Verification of Accredited Investor Status and For Whom Such Verification Should be Required*
  - The SEC should update Rule 506(c) to confirm that the "reasonable verification" standard set forth thereunder applies only to determining "accredited investor" status for natural person investors under Rule 501(a)(5) or (6)

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  - Invesco is also in favor of exempting issuers from the "reasonable verification" standard for offerings with a \$5 million-plus minimum offering amount or under a 3(c)(7) offering where an investor must meet the "qualified purchaser" requirements set forth under the Investment Company Act of 1940, as amended (the "**Investment Company Act**")
  - Invesco is in favor of formalizing a two-year lookback on verification required under Rule 506(c) to tie the standard to the two-year income test set forth in Rule 501(a)(6)
- *Integration Safe Harbors*
  - In lieu of prescribing the four proposed safe harbors, Invesco believes that a single integration safe harbor should be adopted to permit issuers intending to conduct distinct offerings under different Securities Act rules to treat them as separate so long as those offerings are reasonably conducted commensurate with the requirements under such rules
- *Pre-Offering Communications*
  - As posed by the Commission in Question 24 of the Request for Comment, Invesco believes pre-offering communications should be permitted for all exempt offerings so long as they are appropriately tailored to the target audience and marked in accordance with the offering rules for that offering
  - Invesco believes that pre-offering communications need not be limited to "generic solicitations of interest;" targeted pre-offering communications should be permitted within the context of an established Securities Act rule offering so long as conducted consistently with the parameters of the relied-upon rule

II. Modernization of the Definition of "General Solicitation and Advertising" for Offerings under Rule 506(b)

Consideration of Combining Rules 506(b) and (c) for Certain Offerings to Target Investors Meeting a Higher Eligibility Standard than "Accredited Investor Status"

Invesco believes the Commission, within the spirit of Question 20 posed in the Request for Comment, should consider eliminating the prohibition on "General Solicitation and Advertising" in Rule 506(b) or combining the safe harbors laid out in Rules 506(b) and (c) to permit open communications about an offering when targeted at a limited group of purchasers at a higher eligibility level than the minimums provided for in the "accredited investor" definition. For example, offerings to ultra-high net worth investors with higher minimum offering amounts, institutional investors under the 3(c)(7) exception under the Investment Company Act or offerings to Qualified Institutional Buyers (as defined in Rule 144A of the Securities Act) are wholly distinct from broader offerings to any target investor meeting the threshold eligibility criteria under the

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"accredited investor" definition. As outlined herein below, relaxing the restrictions on the types of communications to offerings requiring a $5 million minimum (aligning the offering with the $5 million investment minimum criteria for "qualified purchasers" under the Investment Company Act)[3] would afford investor protection and capital raising flexibility for offerings with smaller audiences. In essence, simply communicating information about an offering intended for a limited audience should not necessarily negate the fact that the offering is indeed a "private offering" because a vast swath of the public would not be eligible to invest.

Codification of the Definition of "General Solicitation and Advertising" and Expanding the "Demo Day Carveout"

Invesco applauds the Commission's initial proposal to further carve "Demo Days" out of the definition of "General Solicitation and Advertising." As posed in Question 21 of the Request for Comment, we believe codifying the definition of "General Solicitation and Advertising," as opposed to providing examples of what could qualify, would provide further clarity to issuers relying on the Rule 506(b) safe harbor (or otherwise carving other types of communications and interactions out of the definition). With the current use of electronic and web-based media (which has been enhanced even moreso in light of the COVID-19 pandemic), it is commonplace that issuers use electronic media to conduct offerings. This reflects the evolution of how private offerings have been conducted since the adoption of Rule 506(b). In this vein, how web-based media is used and whether it complies with the previously-issued LAMP No-Action Letters[4] has caused confusion and an unlevel playing field among sponsors depending on the interpretation of the relevant No-Action Letters (including a sponsor's access to sophisticated outside counsel or the varying opinions of counsel) and the willingness and available resources of the website hosts to comply with the stringent requirements set forth in the No-Action Letters. Further, it is not clear whether those letters set forth requirements for all uses of electronic media or only those designed to assist in capital raising.[5]

This uncertainty also overshadows the fact that there are certain classes of target audiences, such as institutional users, who do not need the same protections as natural persons on the cusp of

[3] This is an example of how existing eligibility criteria could be used in multiple areas of the securities laws; it could be expected that an investor would not invest $5 million in a private placement without having at least $5 million of investments.

[4] *See* Division of Corporation Finance no-action letter to Lamp Technologies, Inc. (May 29, 1997) and related no-action letters.

[5] For example, providing objective information about a fund's participation in an industry-established performance index which sets the expected standards for performance reporting is motivated by investor transparency and reporting consistency as opposed to providing offering information with the intent of participating in a search for prospects through a broker-dealer, registered investment adviser or other similar third party finder.

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the "accredited investor" definition (as discussed further below in respect of Rule 506(c)). Accordingly, we believe that communications targeted at a narrow audience (and the intermediaries representing such audience who are assisting these investors in selecting such offerings) where the sponsor has confirmed that the target audience members have made pre-access representations as to their status under the various securities laws as a Qualified Institutional Buyer or Qualified Purchaser (or, in the alternative, in any case where an offering has a minimum offering amount of $5 million), should be considered excluded from the definition of/ prohibitions on "General Solicitation and Advertising" on a *per se* basis. This step forward could be a reasonable alternative to the proposal above to combine the spirit of Rules 506(b) and (c) for certain offerings targeted at a more limited audience.

The current examples of "General Solicitation and Advertising" such as radio or television broadcast are completely distinct from targeted communications through institutional platforms such as member-only publications, performance indices or consultant databases where the consultants require representations from users that they meet minimum qualifications. Even if these communications are deemed "offers" because the issuer is indirectly providing the information to a limited audience, the audience is in fact not public because of the requirements of a permission-only site or the minimum criteria for access. This would be wholly distinct from publishing information about an offering in a newspaper (or on a newspaper website). Further, the burden of verifying the policies and procedures of these intermediary sites should not be on the issuer if there is a reasonable expectation that the end audience is the class of investors who would qualify for such investment and that audience must make certain representations that the party would qualify for such a private offering. Bearing investor protection in mind, the issuer would remain liable for misstatements and omissions throughout the pre-sale process, achieving investor protection needs. Ultimately, these types of communications are not those that should otherwise transform a private placement into a public offering. Even if certain classes of offerings themselves are not carved out of the "General Solicitation and Advertising" requirements under Rule 506(b), providing clarity to sponsors on what would constitute "General Solicitation and Advertising" would allow consistent dissemination of information about these offerings to the intended limited audience.

III. Recommended Changes to the Rule 506(c) Safe Harbor to Help Increase Use

Clarification of Rule 506(c) to Confirm the Reasonable Verification Requirement Only Applies to Qualifying Natural Persons as "Accredited Investors"

Despite providing a non-exclusive list of verification methods for natural persons, the current formulation of Rule 506(c) seemingly applies the reasonable verification standard to all purchasers, regardless of the identity of the purchaser.[6] We believe this aspect of Rule 506(c) could be clarified to meet the original intent of Rule 506(c) to protect natural persons at the cusp of the eligibility criteria (those investors who would be "accredited investors" under Rules 501(a)(5) or (6)). Accordingly, the reasonable verification standard should only apply to natural persons. This would be a natural next step to make Rule 506(c) more versatile for all sponsors, especially those focusing on attracting larger, institutional investors.

Adopting a Safe Harbor Under Rule 506(c) to Exempt Certain Offerings from the Reasonable Verification Requirements

The Commission also posits in the Request for Comment that there are certain offerings with heightened minimum offering amounts or that are targeted at a certain class of investor that should not require detailed verification. We believe that offerings with minimum investments of $5 million would significantly mitigate the risk that unqualified investors would invest in a 506(c) offering making offerings under such rule much more attractive to sponsors focused on raising institutional and ultra-high net worth capital. Further, the heightened "qualified purchaser" requirements to purchase interests in a vehicle relying on the Section 3(c)(7) exception would minimize such risk greatly. A safe harbor carving these types of offerings out of the reasonable verification requirement would make 506(c) much more attractive. We believe this provides a reasonable alternative to the adjustments to Rule 506(b) laid out above and would make Rule 506(c) more attractive to certain institutional sponsors.

Adopting a Two-Year Lookback on "Reasonable Verification"

Finally, to directly tie the verification requirements to the timeframes set forth in the "accredited investor" definition itself for the income test under Rule 501(a)(6), Invesco believes a two-year lookback safe harbor should be applied to the "reasonable verification" standard. Issuers with available materials verifying accredited investor status dated within two years (used for other offerings, those available to their representative or from earlier in the same offering in the context of an additional commitment, as examples) should be able to seamlessly rely on that information (this would equally reduce the burden on intermediaries contracted to perform such services, making 506(c) more attractive for those intermediaries who would not otherwise distribute a 506(c) security).[7] Additionally, this would help quell the concerns of issuers and intermediaries of

[6] From Rule 506(c): "…The issuer shall take reasonable steps to verify that purchasers of securities sold in any offering under paragraph (c) of this section are accredited investors."

[7] We understand that this may not increase the appetite of various intermediaries to place their clients in private offerings relying on Rule 506(c). The burden of verification may continue to outweigh the benefit regardless of whether the rule specifies the materials used to verify eligibility, particularly as issuers practice reliance on intermediaries to conduct such additional diligence that would not otherwise be required in a Rule 506(b) offering. Increased use of 506(c) may very much continue to be contingent on an issuer's ability to rely

being too intrusive into natural person prospects' personally sensitive information while achieving the underlying intent of taking additional steps to ensure that investors attracted via a wide marketing campaign would qualify for such investment. Further, limiting the amount of times an investor must provide personally sensitive information would provide investor comfort that the information is only being provided when first investing with a sponsor or intermediary and on a reasonable frequency thereafter tied to the existing and well-established two-year income test under Rule 501(a)(6).

IV. Adoption of a Single Integration Safe Harbor Allowing Issuers to Rely on Existing Offering Safe Harbors In Lieu of Currently Proposed Safe Harbors

While we are in favor of the Commission's efforts to provide additional clarity as to what would and would not constitute integration of multiple offerings of the same security, we believe the currently-proposed integration safe harbors would still limit the ease of conducting multiple tranches of capital raising to the detriment of potential investors in an ultimate registered offering. In many cases, retail investors could benefit greatly from having access to portfolio investments which are already identified and acquired by the pooled vehicle in which they would invest. Further, many retail offerings are conducted on an ongoing basis so affording investors a piece of a growing portfolio infused with private capital could be attractive and help lower retail investment risk by enhancing access to a maturing and possibly more diverse portfolio. Imposing time spans between offerings or the completion of prior private offerings could prevent retail investor access to a seeded or growing portfolio.

Using the currently-proposed third safe harbor as an example, requiring an issuer to complete a private offering prior to commencing a registered offering in order to rely on that integration safe harbor implies that the general principle of integration outlined in the Request for Comment would not actually provide the issuer comfort that the two offerings would not be deemed integrated. It would be preferable to codify a safe harbor that permits investors to rely on established private offering safe harbors (such as Rules 506(b) and (c)) while also preparing for and conducting a distinct offering, including a registered offering (or seeking registration for one). This could be accomplished, for example, by permitting an issuer to conduct a 506(b) offering while registering and/or conducting a registered offering. The onus would remain on the issuer to provide appropriate materials to the registered offering's offerees; a 30-day time limit or the completion of a prior private offering would not in and of itself prevent the inadvertent receipt of private offering materials by a public offering offeree.

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on third parties to conduct this verification step supporting the point that the Commission should consider parsing out the types of offerings subject to these verification requirements as outlined above under "III. Recommended Changes to the Rule 506(c) Safe Harbor to Help Increase Use - Adopting a Safe Harbor Under Rule 506(c) to Exempt Certain Offerings from the Reasonable Verification Requirements."

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As the Commission notes, sponsors and issuers could take steps and adopt policies and procedures (which actions are generally expected or required of these regulated entities) to seek to ensure that each offering's materials are marked appropriately and the issuer could, in many cases where the registered offering requires the execution of a subscription agreement, gain comfort from standard representations from purchasers in the registered offering that they, in fact, purchased based on the registered offering materials (which has become a well-accepted representation in the subscription agreements of such offerings including that the investor received, read and understood the materials).[8] Putting aside the technical nature of this, by adopting a single safe harbor, issuers could continue to infuse capital into a pooled vehicle while undergoing the registration process or even post-registration. The public disclosure requirements mandated for a registered offering may also make it more likely that an investor would rely on materials that must be delivered to investors directly and/or are readily accessible on the sec.gov website as opposed to materials prepared for the private offering and designed for accredited investor use.

V. Pre-Offering Solicitations of Interest For Identified Exempt Offerings to Be Permitted

As outlined above in Section IV of this letter, Invesco believes that targeted communications to one constituency should be permitted without fear that an issuer is necessarily conditioning an investor for a distinct offering made to a completely different constituency. Many established firms conduct their offerings in one manner (Rule 506(b) or Rule 506(c)) and should not be prevented from discerning interest in a new vehicle before launching such vehicle just because they know the offering exemption upon which they will rely. A pre-launch Rule 506(c) communication, identified as such and marked accordingly for an offering with distinct minimum investment amounts, targeted at a different investor class than a registered audience and with possibly different liquidity terms, should not result in "gun jumping" if coincident with an offering in registration or a registered offering. As outlined above, there remains significant retail investor upside in establishing rules where issuers are permitted to conduct multiple distinct offerings and seed or support a portfolio with an ongoing injection of capital alongside the retail capital raising efforts. Similarly, a Rule 506(b) limited pre-offering communication whereby an issuer is not conducting "General Solicitation and Advertising" should be permitted where there is a reasonable expectation that an offeree in a registered offering would not receive such materials. This reasonable distinction would further empower sponsors to structure multiple offerings to be conducted concurrently without concern of the pre-offering communications being construed as offers of the public offering or otherwise constituting "gun jumping" (and further provide comfort to sponsors in addition to the integration safe harbor proposed above). Such an enhancement would

[8] In many cases, capital raising in a private offering can precede or align with a registered offering which requires the investor to execute a subscription agreement (which is the case in many unlisted registered offerings). In the case of the sale of listed securities, mandated public disclosure under various securities laws also significantly helps an investor discern the difference between a public offering security and one offered to a limited audience on a private placement basis.

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achieve the Commission's intent of preserving investor protection while, in the case of Rule 506(c) pre-offering communications, make Rule 506(c) more user-friendly and generally enhance retail access to the private markets.

From an execution standpoint, registered offerings are traditionally conducted through intermediaries using agreed-upon materials specified by the issuer for that offering. In many cases, those materials may also require pre-clearance with various regulatory bodies with different standards applied to materials for retail use versus institutional use. The issuer would remain liable for shorter-form institutional-use materials making their way into the hands of retail offerees and it would be in the issuer's best interest to prevent that from happening in light of the heightened standards applicable to communications with retail investors. We believe the risk of an investor relying on extraneous materials from a private offering is low as the issuer controls the suite of materials disseminated for a registered offering. Accordingly, any private offering communications, including those made before an issuer launches a private offering, should be permitted without fear of gun-jumping to enhance the ease of use of the various exemptions and access to as many tiers of capital as possible for the benefit of growing the issuer's portfolio and enhancing retail access to certain investment opportunities that may otherwise be afforded to institutional investors only.

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Invesco appreciates the opportunity to comment on this important Request for Comment, as well as the Commission's consideration of our comments shared in this letter. We are available to discuss our comments or provide any additional information or assistance that the SEC might find useful.

Sincerely,

Invesco Ltd.

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CC: Honorable Jay Clayton, Chair, U.S. Securities and Exchange Commission
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Honorable Elad L. Roisman, Commissioner, U.S. Securities and Exchange Commission
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